86-481

No. _____

Supreme Court, U.S.
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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1986

CENTRAL STATES, SOUTHEAST AND SOUTHWEST AREAS PENSION FUND
and
BOARD OF TRUSTEES, CENTRAL STATES, SOUTHEAST AND SOUTHWEST AREAS PENSION FUND
and
EXECUTIVE DIRECTOR, CENTRAL STATES, SOUTHEAST AND SOUTHWEST AREAS PENSION FUND,
Petitioners,
v.
WHITWORTH BROS. STORAGE COMPANY,
Respondent.

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Where pension plan trustees have arbitrarily and capriciously refused to refund monies mistakenly contributed by a corporate employer on behalf of its co-owner employees, although ERISA expressly permits the Trustees to refund such contributions, and the Sixth Circuit Court of Appeals has ruled that such an employer has a federal common law cause of action to recover such mistaken contributions and prevent unjust enrichment, should this court grant Certiorari to review the Court of Appeals' ruling on that issue?

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PARTIES TO THE PROCEEDING

The parties to this proceeding are the same as in the Courts below and are all set forth in the caption of the pleadings herein.

OPINIONS BELOW

The opinion of the Court of Appeals for the Sixth Circuit is reported at 749 F.2d 221. That opinion and the District Court's memorandum and orders are both reprinted in appendix to Central States' petition, respectively at pages 1a - 28a and 29a - 32 a.

STATEMENT OF THE CASE

William and Ernest Whitworth were and are co-owners and employees of Whitworth Bros. Storage Company (Whitworth Bros.) (Complaint, Pagragraph 6). From 1955 to 1980 for William and from 1955 to 1981 for Ernest, Whitworth Bros. made employer contributions to Central States, Southeast and Southwest Areas Pension Fund (Central States), mistakenly thinking that William and Ernest were employees covered by the Collective Bargaining Agreement. (Complaint, Paragraphs 11 and 19). Had William and Ernest been employees and not employee-owners they would have been entitled to a pension from their contributions. Discovering the mistake, Whitworth Bros. requested that Central States return the money mistakenly con-

tributed on behalf of William (Complaint, Paragraphs 11 and 20). The amounts contributed on behalf of William and Ernest were approximately $9,000 from 1955 through 1974 and $11,000 from 1975, the effective date of ERISA, through 1980 for William and 1981 for Ernest (Complaint, Paragraphs 10 and 19). Central States refused to return most of the money contributed on behalf of William, but did return the money contribution on behalf of him from November 11, 1979 through March 1, 1980, less than four months of contributions out of 25 years of contributions. (Complaint, Paragraphs 12 and 20). Despite the fact that neither William nor Ernest are eligible to receive a pension because they are co-

owner-employees, and despite the fact that Central States has refused to return most of the money contributed on behalf of William, the Central States continued to bill Whitworth Bros. from August, 1981 through May, 1983 for $1,701.86 for Whitworth Bros.' contribution on behalf of Ernest and threatened Whitworth Bros. with legal action or collection proceedings if payment were not made (Complaint, Paragraphs 26 and 27).

Alleging that Central States' refusal to return the Whitworth Bros.' contributions on behalf of William pursuant to 29 U.S.C. § 1103(c)(2)(A)(ii) is arbitrary and capricious and violates Central States' fiduciary duties under ERISA and 29 U.S.C. § 1104(a), Whitworth Bros. sued Central States in Federal District Court

for return of the money. Return of the money contributed by mistake since 1975, ERISA, the effective date of ERISA was sought pursuant to federal law under ERISA, Count One; return of money prior to 1975, ERISA, was sought pursuant to a pendent state cause of action, Complaint, Count Two; Whitworth Bros. also sought a declaratory judgment that it does not have to make contributions that will not result in a pension and which Central States may not voluntarily return on behalf of Ernest, Complaint, Count Three.

Central States moved to dismiss the Complaint for lack of jurisdiction or failure to state a claim under Federal Rule 12(B)(1) or 6. The District Court granted the motion (Page 29 in Appendix to Petition).

The Court of Appeals for the Sixth Circuit considered three bases as to whether the District Court had jurisdiction of Whitworth's claim; (1) as an express action authorized in ERISA; (2) as an action implied from the terms of the statute; (3) as an action arising under federal common law. The Court found in the negative on points (1) and (2) and affirmatively on point (3). Central States applied for a rehearing "en banc" which was denied, followed by its Petition herein.

SUMMARY OF ARGUMENT FOR NOT GRANTING THE WRIT

The writ should be denied for the following reasons:

(I) The decision of the Sixth Circuit follows principles enunciated by this Supreme Court on the issue of a federal common law remedy.

(II) While the decision below does conflict with that of the Eleventh Circuit Court of Appeals on the issue of "federal common law remedy", the conflict that exists in the Circuits, on the issue of "federal common law remedy", is premature for consideration in this Court on this point. Further, Certiorari was denied in a similar case

in January, 1986 on the issue of "implied cause of action".[1]

(III) This case does not adversely affect "the well being of millions of employees" as suggested by Central States. It does, however, prevent Central States: from unjustly enriching itself with Whitworth's money mistakenly given and received; from acting arbitr-

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[1] Award Service, Inc. v. Northern California Retail Clerks Unions, 763 F.2d 1066 (9th Cir. 1985). cert. denied January 1986, 106 S. Ct. 850). The decision, allowing the remedy of restitution to an employer, was based on a finding of "implied" cause of action not "federal common law remedy". Thus, the spirit but not the letter of its holding conflicts with Dime Coal Co., Inc. v. Combs, 796 F.2d 394 (11th Cir. 1986), and with the Sixth Circuit Whitworth finding on "implied" cause of action. Attention is respectfully directed to Respondent's Cross Petition filed herein for a discussion of "implied cause of action".

arily and capriciously and refusing to refund the money belonging to Whitworth; and from legitimizing its unjust enrichment by denying Whitworth access to the courts under ERISA. This case merely holds that the employer can seek a refund of monies mistakenly contributed on behalf of an employee for whom the pension fund will not have to fund a pension. This is not a case that needs review on the point raised. If however this Court should decide to review this issue, it should review all related issues and grant the Cross Petition filed contemporaneously herewith.

(I) RECOGNITION OF FEDERAL COMMON LAW RESTITUTION IN THIS ERISA CASE IS CONSISTENT WITH SUPREME COURT HOLDINGS IN SIMILAR CASES

To suggest, as does Central States, that the "decision in the present case conflicts in principle with the decision of this Court in Northwest Airlines"[2] and other Supreme Court cases is wrong. The Northwest Airlines case involved an employer guilty of discrimination under the Equal Pay and Civil Rights Acts. The employer, Northwest, sought contribution from the Union as a joint tort feasor, in anticipation of a large potential judgment in favor of its employees. Neither

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[2] Northwest Airlines, Inc. v. Transport Workers Union of America, AFL-CIO, et al., 451 U.S. 77 (1981).

statute there suggested or inferred contribution among joint tort feasors as a remedy, unlike ERISA in the instant case which expressly authorizes the "refund" of mistakenly paid contributions. (§ 403(c)(2)(A)(ii). Similarly, Texas Industries, Inc. v. Radcliffe Materials, Inc., 451 U.S. 650, 1981 cited by petitioners, also holds that there is no federal right to contribution among anti-trust co-conspirators. The employer Whitworth, unlike Northwest Airlines, has not been guilty of wrongful conduct. Central States, on the other hand, has acted wrongfully, "arbitrarily and capriciously" to unjustly enrich itself. This Court in Northwest Airlines recognized two ways

in which a federal cause of action may be implied, saying:

> "Even though Congress did not expressly create a contribution remedy, if its intent to do so may fairly be inferred from either or both statutes, an implied cause of action for contribution could be recognized on the basis of the analysis used in cases such as Cort v. Ash. . .Cannon v. University of Chicago. . .Second, a cause of action for contribution may have become a part of the federal common law through the exercise of judicial power to fashion appropriate remedies for unlawful conduct." Northwest Airlines, Inc. v. Transport Workers Union of America, AFL-CIO, et al., 451 U.S. 77 (1981). (emphasis added)

Whitworth Bros. in its cross petition argues that the first method described in Northwest Airlines applies because Congress did imply that employers should be able to sue to recover money mistakenly paid on behalf of employees pursuant

to § 403(c)(2)(A)(ii). The Court of Appeals for the Sixth Circuit held that the second method described in Northwest Airlines applied.

The other cases cited by Central States are also clearly distinguishable. For example, City of Milwaukee v. State of Illinois, et al., 451 U.S. 304 (1981) held that an early federal common law cause of action to abate a nuisance against a water polluter, was no longer necessary because Congress had passed the Water Pollution Act which specifically established criteria as to what was a nuisance and thus dealt with the problem. The earlier decided Milwaukee case[3]

[3] State of Illinois v. City of Milwaukee, Wisconsin, et al., 406 U.S. 91 (1972).

was like Whitworth in that "nuisance" at common law was as well recognized as "unjust enrichment".

Unlike the Whitworth case, however, the Water Pollution Act obviated the Court's need to apply the common law theory by replacing the common law nuisance with a more specific statutory nuisance cause of action. In ERISA, Congress has not replaced an employer's claim for unjust enrichment with anything, but has acknowledged it in § 403(c)(2)(A)(ii).

In Massachusetts Mutual v. Russell, 105 S.Ct. 3085 (1985) this Court refused to imply an ERISA cause of action to an employee against the trustees of a plan for extra contractual damages for termination for five months of benefits that

were later refunded. There the employee received the benefits she was entitled to under the plan, refund of the terminated benefits. She wanted a remedy not authorized by ERISA, compensatory and punitive damages. Here Whitworth Bros. merely seeks to receive what ERISA permits it to receive under § 403(c)(2)(A)(ii), a refund of the money mistakenly contributed on behalf of its owner-employee. Section 403(c)(2)(A)(ii) creates the remedy. Federal common law allows Whitworth Bros. to bring suit to enforce the statutory remedy in the face of the arbitrary and capricious refusal by the Central States to refund the money. The Russell decision is therefore in no way contrary to the Sixth

Circuit Court of Appeals' recognition of the old remedy of restitution. Whitworth Bros. is not seeking to create a federal remedy, it is seeking to enforce the federal remedy created in § 403(c)(2)(A)(ii).

(II) CONFLICT OF TWO CIRCUITS IS PREMATURE FOR REVIEW ONLY OF FEDERAL COMMON LAW ISSUE.

It has been said that Congress intended the Courts to fashion a body of federal common law to govern ERISA suits.[4]

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[4]See Scott v. Gulf Oil Corp., 754 F.2d 1499, 1502 (9th Cir. 1985) (Congress intended courts to fashion a body of federal common law to govern ERISA suits); Van Orman v. American Ins. Co., 680 F.2d 301, 311 (3rd Cir. 1982); Murphy v. Heppenstall Co., 635 F.2d 233, 237 (3rd Cir. 1980) (citing Senator Javits' remarks as support for congressional authorization of the evolution of federal common law of pension plans), cert. denied, 454 U.S. 1142 (1982); Teamsters Pension Trust Fund v. Philadelphia Fruit Exch., 603 F. Supp. 877, 880 (E.D. Pa. 1985) (employees claims based on federal common law of pension funds); Taylor v. Bakery & Confectionary Union & Indus. Int'l. Welfare Fund, 455 F.Supp. 816, 818-19

With only two Circuits in conflict on the issue of federal common law as it applies to employers' right to sue for restitution of mistakenly paid funds,[5] it is premature to review this issue. However, if this Court should decide not

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[4] (continued)
(E.D.N.C. 1978) (courts are to create federal common law); H.R. Rep. No. 1280, 93d Cong., 2d Sess. 327 (1974), reprinted in 3 Legislative History, supra note 2 at 4277, 4594 (all civil actions by participants and beneficiaries "are to be regarded as arising under the laws of the United States in similar fashion to those brought under Section 301 of Labor-Management Relations Act of 1974"); 120 Cong. Rec. 29,942 (1974), reprinted in 3 Legislative History, supra note 2, at 4771 (statement of Senator Javits) (body of federal substantive law will be developed). See 54 Fordham Law Review 225, 242 (Scanlon), wherein the above analysis is set forth. Also see opinion of Sixth Circuit in Whitworth (pages 24a-28a, Appendix to petition).

[5] Dime Coal Company, Inc. v. Combs, 796 F.2d 394 (11th Cir. 1986); Whitworth v. Central States (subject). cf. Teamsters Local 639 - Employees Health Trust v. Cassidy Trucking, Inc.,

to wait for other Circuits to rule, the review of the "implied cause of action" issue raised in Respondent's Cross Petition would permit this Court to review the entire problem of "unjust enrichment" and the refund of mistaken employer contributions.

(III) THERE IS NO EVIDENCE OF FINANCIAL ADVERSITY TO THE WELL-BEING OF THE PENSION FUND. ONLY THE WELL-BEING OF WHITWORTH IS AFFECTED BY THE LOWER COURT'S DECISION

To suggest as does Central States that the decision in this case undermines the "financial soundness" of a "substantial" number of plans and the "security of

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[5](continued)
646 F.2d 865, 868 (4th Cir. 1981) in which the Fourth Circuit allowed an employer's action based on restitution in the presence of equitable factors so dictating.

millions of employees and their dependents" is hypocritical hyperbole. There is no evidence that refunds of the money that Whitworth Bros. mistakenly paid on behalf of William and Ernest will "undermine" any pension plan. If the Central States' plan has no obligation to give pension benefits to Ernest and William Whitworth, the refund of their money should not affect the plan. Retention of such monies unjustly enriches the plan.[6] The ironic wrong of denying Whitworth Bros. a suit in this case is illustrated by Central States' pursuit, and threat of collection proceedings, of more contri-

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[6] Peckham v. Board of Trustees, et al., 719 F.2d 1093 (10th Cir. 1983).

butions on behalf of brother Ernest Whitworth. This was after Central States had refused to return all but four months of 25 years of contributions of brother William Whitworth who was not entitled to a pension. To deny Whitworth Bros. a right and a remedy would put Central States in a position to demand money to which it is not entitled and not have to return it. Owner employees of small businesses could be misled and bilked of funds with no judicial redress.

CONCLUSION

In, summary, the decision of the Sixth Circuit as to a federal common law cause of action is not inconsistent

with the pronouncements of this Court.[7] ERISA was not intended to be used as a shield, as urged by Petitioner Central States, to justify common law wrongdoing in the form of wilful, arbitrary and capricious unjust enrichment. The Court of Appeals acknowledged this. Its decision recognized: the need to prevent unjust enrichment; and the fact that Congress intended federal common law to aid in the enforcement of ERISA. For Central States to piously posture about the "well being and security of millions" while they arbitrarily, capriciously and inten-

[7]Recent Supreme Court cases holding that ERISA must be viewed in light of the common law are discussed in detail in Respondent's Cross Petition at pages 29 - 33.

tionally undermine the well-being and security of the Whitworth brothers and others like them is hypocrisy at best and unjust immorality at worst.

For the above reasons, the Sixth Circuit finding of common law cause of action should stand and the Central States Petition for Certiorari should be denied.

Respectfully submitted,

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